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INTRODUCTION

The Office of Professional Responsibility (OPR) was established by order of the Attorney General to ensure that Department of Justice attorneys and law enforcement personnel perform their duties in accordance with the highest professional standards expected of the nation's principal law enforcement agency. Pursuant to 28 C.F.R. § 0.39a, the Counsel for OPR reports directly to the Attorney General and Deputy Attorney General. OPR is staffed by a Deputy Counsel, Associate Counsel, and Assistant Counsel.

THE ROLE AND AUTHORITY OF OPR

OPR has jurisdiction to investigate allegations of professional misconduct against Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice, including allegations of professional misconduct against Department immigration judges. OPR also has jurisdiction to investigate allegations of misconduct against Department law enforcement personnel that relate to allegations of attorney misconduct within the jurisdiction of OPR. The Office of the Inspector General has jurisdiction over all allegations of misconduct against Department attorneys that do not fall within OPR's jurisdiction.

In addition to reporting its findings and conclusions in investigative reports, OPR provides advice to the Attorney General and Deputy Attorney General concerning the need for changes in policies and procedures that become apparent during the course of OPR's investigations.

REPORTING ALLEGATIONS OF MISCONDUCT

Pursuant to Chapter 1-4.100 of the United States Attorneys' Manual (USAM), all Department employees have a duty to report allegations of professional misconduct against a Department attorney that relate to the exercise of the attorney's authority to investigate, litigate, or provide legal advice, as well as allegations of misconduct against Department law enforcement personnel that relate to allegations of attorney misconduct within the jurisdiction of OPR.

Department employees must report "any evidence or non-frivolous allegation of misconduct" to their supervisor. An employee may also refer the allegation directly to OPR. Supervisors are required, in turn, to report any evidence or non-frivolous allegation of serious misconduct to OPR. However, if the supervisor participated in the alleged misconduct, he must refer the matter to a higher-ranking official for review. Employees and supervisors are encouraged to contact OPR for assistance in determining whether a matter should be referred to OPR.

Reporting Allegations of Misconduct During the Course of Judicial Proceedings

Judicial findings of attorney misconduct must be reported to a supervisor and to OPR. Any statement by a judge or magistrate judge indicating that a Department attorney has engaged in professional misconduct, and any indication by a judge or magistrate judge that the court is taking under consideration an allegation of professional misconduct, must be reported to a supervisor. The supervisor must, in turn, report to OPR "any evidence or non-frivolous allegation of serious misconduct."

Except in extraordinary cases, judicial findings of misconduct are investigated by OPR without awaiting the outcome of further judicial proceedings. Thus, allegations of misconduct must be reported to OPR regardless of whether an appeal is contemplated or has already been taken.

Allegations that Must be Reported to OPR

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THE REVIEW OF MISCONDUCT ALLEGATIONS

OPR receives allegations against Department attorneys from a variety of sources, including U.S. Attorneys' Offices and litigating divisions, private individuals and attorneys, defendants and civil litigants, other federal agencies, state and local government agencies, judicial and congressional referrals, media reports, and self-referrals. OPR also regularly conducts searches of legal databases to identify opinions containing judicial findings of misconduct against Department attorneys.

OPR reviews each allegation and determines whether further review is warranted. The determination whether to close the matter or to obtain more information about the allegation is a matter of investigative judgment and involves many factors, including the nature of the allegation, its apparent credibility, its specificity, its susceptibility to verification, and its source. The majority of complaints received by OPR are determined not to warrant further review because, for example, the complaint is frivolous on its face, is outside OPR's jurisdiction, or is unsupported by any evidence. In such cases, OPR will close the matter without informing the subject attorney of the complaint.

When OPR needs more information to resolve the matter, OPR will initiate an inquiry. In such cases, OPR may request additional information from the complainant or from the subject attorney. Most inquiries are closed with no misconduct findings.

In cases that cannot be resolved based solely on the written record, OPR ordinarily initiates an investigation, which includes requesting and reviewing relevant documents and conducting interviews of witnesses and the subject attorney. The decision to conduct an investigation does not give rise to a presumption of professional misconduct. OPR makes misconduct findings only after conducting a full investigation.

Even when the subject attorney resigns or retires during the course of an investigation, OPR ordinarily completes the investigation in order to better assess the litigation impact of the alleged misconduct and to permit the Attorney General and Deputy Attorney General to judge the need for changes in Department policies or practices. In certain cases, however, the Office of the Deputy Attorney General will approve termination of such investigations if it is in the best interest of the Department.

THE INVESTIGATIVE PROCESS

OPR's inquiries and investigations involve a wide range of allegations, and the investigative methods used vary accordingly. In many cases, OPR initiates an inquiry because more information is needed to resolve the matter. In such cases, the first step is usually to request a written response from the attorney against whom the allegation has been made. Requests for written responses should be answered promptly and thoroughly. Supporting documentation and other relevant material should be included with the response, and other individuals with relevant information should be identified. However, the subject attorney should not interview other witnesses or ask them to prepare affidavits or written statements. In addition, the subject attorney's written response should not be edited or revised by any other Department attorney or official. If an attorney's trial schedule or other commitments preclude a timely response, an extension of time may be obtained by contacting OPR.

In requesting a written response, OPR asks the subject attorney to provide pertinent information regarding his professional background and experience, including his length of service and positions held with the Department. In order to determine what state bar rules may apply, OPR also asks the subject attorney to list each jurisdiction in which he maintains bar membership, regardless of his category of membership (e.g., active, inactive, associate, or some other membership category).

If OPR determines based on its review of the record that there is no reasonable likelihood of a professional misconduct finding, the subject attorney and the component head are notified that further inquiry is unwarranted and that the matter is closed.

In cases that cannot be resolved based on a review of the written record, OPR initiates an investigation of the alleged misconduct. Interviews are ordinarily conducted by two OPR attorneys. The interview of the subject attorney is transcribed by a court reporter, and the interviews of other witnesses are digitally recorded. Neither the subject nor a witness is permitted to record the interview. Co-workers are not permitted to attend interviews.

Following preparation of the transcript, the subject attorney will be given an opportunity, pursuant to a confidentiality agreement, to review the transcript and, if necessary, submit a supplemental written response. The confidentiality agreement requires that all copies of the transcript be returned to OPR.

All Department employees have an obligation to cooperate with OPR investigations and must respond to questions posed during the course of an investigation upon being informed that their statements will not be used to incriminate them in a criminal proceeding. Employees who refuse to cooperate with OPR investigations may be subject to formal discipline, including removal. See Attorney General's April 12, 2002 Memorandum, "Duty to Report Misconduct and Cooperate with Investigations."

ASSISTANCE OF COUNSEL

The majority of OPR investigations are administrative in nature, and employees are not entitled to counsel as a matter of law. However, counsel may be permitted if counsel does not interfere with or delay the interview. Counsel must be actually retained by the employee as his legal representative, not as an observer. Counsel are not permitted access to certain confidential criminal investigative information and may not be permitted access to grand jury information.

POST INVESTIGATION PROCEDURES

At the conclusion of the investigation, OPR prepares a report of investigation in which it makes findings of fact and reaches conclusions as to whether the subject attorney committed professional misconduct. OPR may find the subject attorney committed professional misconduct by: (1) intentionally violating a clear and unambiguous obligation or standard imposed by law, applicable rule of professional conduct, or Department regulation or policy; or (2) recklessly disregarding his obligation to comply with that obligation or standard. OPR may also find that the attorney exercised poor judgment or made a mistake. A poor judgment finding may lead to disciplinary action; a mistake finding does not.

Once OPR completes its report of investigation, the subject attorney and the component head are officially notified of the results of the investigation. If OPR determines that the subject attorney committed professional misconduct, prior to issuing a final report, the subject attorney, pursuant to a confidentiality agreement, and the component head may review the draft report, comment on the factual findings, and offer arguments as to why OPR should alter its conclusions. OPR will consider the comments and incorporate them into the final report, to the extent OPR considers it appropriate.

OPR may include in its report information relating to management and policy issues noted in the course of the investigation for consideration by Department officials.

Pursuant to 28 C.F.R. § 0.39a and OPR's routine uses under the Privacy Act, OPR also notifies the complainant of the results of the investigation.

DEPARTMENTAL REVIEW OF OPR MISCONDUCT FINDINGS

In December 2010, the Department established the Professional Misconduct Review Unit (PMRU) to review OPR misconduct findings in matters involving Assistant United States Attorneys and Criminal Division attorneys. The PMRU does not review poor judgment findings, which are referred to the component head or to the United States Attorney for appropriate action.

When OPR determines that an attorney who falls within PMRU's jurisdiction has committed professional misconduct, OPR provides its report of investigation directly to the PMRU for review without making a disciplinary recommendation. OPR will provide the report of investigation to the subject attorney and the United States Attorney or the component head.

If the PMRU determines that OPR's misconduct findings are not supported by the evidence, it refers the matter to the component head or the United States Attorney for action consistent with the PMRU's determination. The PMRU's determination is the Department's final ruling on the matter.

If the PMRU determines that OPR's misconduct findings are supported by the evidence, the PMRU makes a disciplinary recommendation. The PMRU seeks input from the United States Attorney and EOUSA regarding any applicable Douglas factors, which must be considered in determining the appropriate disciplinary action.

In matters resulting in the issuance of a reprimand, a PMRU attorney issues the reprimand, and the Chief of the PMRU serves as the grievance official. In matters resulting in a suspension of 14 days or less, a PMRU attorney serves as the proposing official; the PMRU Chief serves as the deciding official; and the Office of the Deputy Attorney General serves as the grievance official. In matters resulting in a suspension of more than 14 days, a PMRU attorney serves as the proposing official; the PMRU Chief serves as the deciding official; and the subject attorney may appeal the decision to the Merit Systems Protection Board (MSPB).

When OPR concludes that a subject attorney engaged in professional misconduct but the attorney is not employed in a component that falls under the jurisdiction of the PMRU, OPR recommends a range of discipline that is not binding on the management officials responsible for imposing discipline. However, if an official decides to impose discipline that is outside the range of discipline recommended by OPR (whether harsher or more lenient), the management official must notify the Office of the Deputy Attorney General before implementing that decision.

REFERRAL OF MISCONDUCT FINDINGS TO BAR DISCIPLINARY AUTHORITIES

At the conclusion of the disciplinary process, OPR will notify state bar authorities of misconduct findings that involve the violation of a bar rule. In addition, when the PMRU upholds an OPR finding of professional misconduct based on the violation of a state bar rule, OPR will, at the PMRU's request, notify state bar authorities of the misconduct finding within 30 days of the final disposition of the matter by the PMRU.

ROUTINE USES OF INVESTIGATIVE INFORMATION

In addition to the internal uses by Department officials, OPR's findings may be disseminated for the routine uses published at <u>76 Fed. Reg. 66752 (10/27/11)</u>. These uses include disclosure to other government agencies and officials for law enforcement purposes; to individuals or agencies in order to elicit information relevant to the investigation or another pending proceeding; to a court, grand jury, or regulatory or administrative agency; to other federal agencies when requested in connection with the hiring or retention of an employee, the issuance of a security clearance, or the investigation of an employee; to complainants to inform them of the results of OPR's review of their complaints; and to the subjects of an inquiry or investigation.

OPR Review of Proposals to Refer Non-DOJ Attorneys to Bar Disciplinary Authorities

Pursuant to Section 1-4.150 of the USAM, allegations of misconduct by non-DOJ attorneys and judges must be reported to OPR for a determination of whether to report the allegations to appropriate disciplinary officials. The Department has established a protocol that accommodates the Department attorney's obligation to report the unethical conduct of an attorney to state bar disciplinary authorities, and the interest of the Department in protecting confidential information. See USAM § 1-4.150; g28 C.F.R. § 0.39(a)(9); ABA Model Rule 8.3(a). OPR will determine, in conjunction with the Department component that referred the matter to OPR, whether to report the unethical conduct of the non-Department attorney or judge to the appropriate disciplinary authorities.

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Yes No